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1 **UNITED STATES DISTRICT COURT**
2 **NORTHERN DISTRICT OF CALIFORNIA**

3 CHASOM BROWN, WILLIAM BYATT,
4 JEREMY DAVIS, CHRISTOPHER
5 CASTILLO, and MONIQUE TRUJILLO
6 individually and on behalf of all similarly
7 situated,

8 Plaintiffs,

9 vs.

10 GOOGLE LLC,

11 Defendant.

12 Case No.: 4:20-cv-03664-YGR-SVK

13 **DECLARATION OF MARK C. MAO IN
14 SUPPORT OF PLAINTIFFS'
15 SUPPLEMENTAL SANCTIONS
16 MOTION**

17 Referral: The Honorable Susan van Keulen

1
DECLARATION OF MARK C. MAO
2

I, Mark C. Mao, declare as follows.

1. I am a partner with the law firm of Boies Schiller Flexner LLP, counsel for Plaintiffs
2 in this matter. I am an attorney at law duly licensed to practice before all courts of the State of
3 California. I have personal knowledge of the matters set forth herein and am competent to testify

2. I submit this Declaration in support of Plaintiffs' Supplemental Sanctions Motion.

3. On February 26, 2022, Plaintiffs filed a request for an order to show cause why
4 Google should not be sanctioned for discovery misconduct. Dkt. 430 ("February Sanctions
5 Motion"). The February Sanctions Motion was initially based on Google's failure to provide
6 discovery regarding Google's "maybe_chrome_incognito" Incognito-detection bit.

7. On March 10, 2022, Plaintiffs deposed Dr. Caitlin Sadowski, Google's Rule
8 30(b)(6) designee on Google's Incognito-detection bits. Dr. Sadowski identified two additional
9 Incognito-detection bits, the "is_chrome_incognito" and "is_chrome_non_incognito" bits,
10 [REDACTED] These were located in logs not previously identified
11 as containing Incognito-detection bits.

12. On March 21, 2022, Plaintiffs filed a supplement to their February Sanctions
13 Motion focused on the additional Incognito-detection bits that Dr. Sadowski identified during her
14 deposition.

15. On April 5, 2022, Google filed its response to Plaintiffs' February Sanctions
16 Motion (Dkt. 528), and on April 12, 2022, Plaintiffs filed their reply (Dkt. 535).

17. On April 21, 2022, the Court held an all-day in-person evidentiary hearing on
18 Plaintiffs' February Sanctions Motion.

19. On May 20, 2022, the Court issued its order granting in part and denying in part
20 Plaintiffs' February Sanctions Motion. Dkt. 588 ("Sanctions Order").

21. On May 31, 2022, Google filed a publicly-available proposed redacted version of
22 the Sanctions Order. Dkt. 593-3.

10. As part of the Sanctions Order, Google was required to provide an attestation by May 31, 2022, that “other than the logs identified thus far as containing Incognito-detection bits, no other such logs exist.” Dkt. 593-3 at 6.

11. On May 31, 2022, Plaintiffs received a declaration from Google employee Martin Sramek stating that Google’s investigation started on May 23 and was “ongoing,” and that it would take another two weeks. Dkt. 614-3.

12. At no time did Plaintiffs agree to any extension or modification of Google's obligation to provide the attestation responsive to the Sanctions Order. Google also did not attempt to justify why it needed an extension to investigate the existence of logs that Plaintiffs had been seeking to identify for many months, and that the Court specifically inquired about during the April 21, 2022 sanctions hearing.

13. On June 14, 2022, Plaintiffs received a declaration from Mr. Sramek identifying the [REDACTED] additional logs containing the three previously-identified Incognito-detection bits.

14. Prior to June 14, 2022, Google had not identified any of those [REDACTED] additional logs as containing Incognito-detection bits.

15. Thereafter, my colleagues and I contacted counsel for Google to seek additional information concerning these newly-revealed [REDACTED] additional logs.

16. Google has refused to provide any details aside from those contained in the June 14, 2022 Sramek Declaration.

17. These attempts to meet and confer also involved Google's preservation obligations related to the █ additional logs, and Google refused to respond to that preservation inquiry.

18. Google's counsel has also yet to confirm when they first became aware of the Incognito detection bits.

19. Attached hereto as **Exhibit A** are Plaintiffs' proposed preclusion orders and jury instructions.

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed this 4th day of August, 2022, at San Francisco, California.
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4 /s/ *Mark C. Mao*
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